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In the Supreme Court of the United States

OCTOBER TERM, 1980

SILVER SPUR CASINO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly concluded that petitioners violated Section 8(a)(5) of the National Labor Relations Act by withdrawing recognition from and refusing to bargain with the union without having a reasonably based good-faith doubt of the union's majority support among their employees.

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Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
Section 8(a), 29 U.S.C. 158(a)	1
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 623 F.2d 571. The decisions and orders of the Board (Pet. Supp. App. 1-107) are reported at 228 N.L.R.B. 1147 (*Silver Spur*), 229 N.L.R.B. 1186 (*Nevada Club*), and 229 N.L.R.B. 1128 (*Finally, Inc.*).

JURISDICTION

The judgments of the court of appeals (Pet. App. 25-34) were entered on July 14, 1980. The petition for a writ of certiorari was filed on October 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 * * *;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *.

2. Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), provides in part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power

to issue and cause to be served upon such person a complaint stating the charges * * * and containing a notice of hearing * * *: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *.

STATEMENT

1. Each of the petitioners (Silver Spur Casino, Nevada Club and Finally, Inc., d/b/a Palace Club) operates a bar, restaurant and casino in Reno, Nevada (Pet. Supp. App. 5, 22, 69). In 1951, Nevada Club became a member of the Reno Employers Council (the "Association") (*id.* at 24). In 1968 and 1969, Silver Spur and Finally, Inc. also joined the Association (*id.* at 6, 71). The Association represents its members in collective bargaining with various unions, including Hotel-Motel-Restaurant Employees and Bartenders International Union, AFL-CIO (the "Union") (*id.* at 71). When petitioners joined the Association, they became parties to the then existing collective bargaining agreement between the Union and the Association. In doing so, they recognized the Union as the representative of their bar and culinary employees (*id.* at 6).

In December 1974, petitioners announced their withdrawal from membership in the Association (Pet. Supp. App. 6, 26, 71). Thereafter, petitioners refused the Union's request to enter into collective bargaining on an individual basis. Petitioners claimed that they had a genuine doubt that the Union represented an uncoerced majority of their employees. (*Id.* at 74-75.)

2. Unfair labor practice charges were then filed by the Union. The Board concluded that petitioners

had violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union on an individual basis without having a reasonably based good-faith doubt of the Union's continued majority support among their employees (Pet. Supp. App. 2, 13, 57, 64, 102).

Relying on its decision in *Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget*, 227 N.L.R.B. 357 (1976), enforced, 584 F.2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979), the Board held that petitioners' voluntary recognition of the Union established a presumption that the Union possessed the majority support of their employees, and that this presumption survived despite petitioners' withdrawal from the multi-employer bargaining unit (Pet. Supp. App. 13, 44-45, 65). In light of this presumption, the Board concluded that petitioners were not entitled to withdraw recognition from the Union unless they could establish that the Union in fact no longer represented a majority of their employees or that petitioners had a reasonable doubt as to the Union's continuing majority status (*id.* at 13, 45-46, 95). The Board determined that the evidence relied upon by petitioners to establish a reasonable doubt of majority status was insufficient to make either showing (*id.* at 8-12, 49-57, 95-102).[1]

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[1] In asserting its doubt as to the Union's majority support, Nevada Club relied upon newspaper articles concerning organizing efforts to overcome low union membership and alleged financial difficulties in the Reno area, high turnover of unit employees, Union inactivity in representing employees, reports of employee dissatisfaction with the Union, and Nevada's status as a right-to-work state. The Administrative Law Judge, upon considering all these factors, concluded that Nevada Club had failed to "show[] that it had a reasonably based doubt, which was based upon objective considera-

3. The court of appeals, relying on its prior decisions in *NLRB* v. *Tahoe Nugget, Inc.*, 584 F.2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); *Sahara-Tahoe Corp.* v. *NLRB*, 581 F.2d 767 (9th

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tions, of the Union's presumed majority status at the time [the company] withdrew recognition from the Union" (Pet. Supp. App. 57). He pointed out that the newspaper articles covered the entire geographic area and were not limited to Nevada Club's bar and culinary employees (*id.* at 52). He explained that Nevada Club's reliance on turnover was ineffective because, under Board precedent, new employees are presumed to support the union in the same ratio as the old (*id.* at 53-54). Concerning the contention that the Union had filed no grievances, the Administrative Law Judge noted that there was no showing that grievances were warranted; he also noted that a Union representative had frequently visited the premises and had not been requested to file grievances by the employees (*id.* at 49). Regarding the purported employee dissatisfaction with the Union, the Administrative Law Judge observed that the evidence concerned only a few employees in a unit of approximately 105 employees and that such a small percentage "hardly constitutes a sufficient objective consideration warranting a refusal to bargain" (*id.* at 55-56). The Administrative Law Judge noted that there was an important "distinction * * * between union membership and union support," and concluded that, because "union membership [is] voluntary in this right-to-work State," lack of union membership could not be relied upon as evidence of lack of Union support (*id.* at 51).

Silver Spur also relied on alleged Union financial difficulty and organizational activity, turnover, lack of grievance activity and reported employee dissatisfaction with the Union (Pet. Supp. App. 8-12). As to the latter, the Administrative Law Judge noted that there were only four employees out of a total of 100 whose statements could be considered to reflect opposition to the Union. The reports of employee dissatisfaction that were made by the employer's supervisors, he concluded, were "labored, inept, and [so] lacking in consistent

Cir 1978), cert. denied, 442 U.S. 917 (1979); *NLRB* v. *Sierra Development Co.*, 604 F.2d 606 (9th Cir. 1979); and *NLRB* v. *Carda Hotels, Inc.*, 604 F.2d 605 (9th Cir. 1979), upheld the Board's decisions and enforced its orders (Pet. App. 1-34). The court agreed with the Board that the presumption that the Union represented a majority of the employees remained applicable to the individual employer units

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or meaningful detail as to suggest * * * that the employee manifestations of anti-union feeling on which they reputedly were based also were grossly overblown * * *." (*id.* at 12.)

Finally, Inc., relied on the same reports of financial difficulty and organizing activity, turnover, lack of grievance activity and reports of employee dissatisfaction with the Union (Pet. Supp. App. 95-101). The Administrative Law Judge noted that here, too, the expressions of employee dissatisfaction came from a small percentage of the total unit (three out of 110). Accordingly, he concluded they were entitled to little weight (*id.* at 100-102).

In an effort to prove that the Union in fact no longer enjoyed majority support, all three employers sought to adduce testimony from Union business representative Lawrence as to whether there existed union business records demonstrating that the Union represented a majority of the unit employees. In each case, the Board rejected the proffered evidence. The Board reasoned that, since union membership was voluntary in the State of Nevada, record evidence concerning the extent of union membership would be irrelevant to determining whether a majority of employees desired union representation. (Pet. Supp. App. 2, 40, 64.) The employers also sought to adduce testimony from a Board field examiner regarding his examination of the Union's business records and his alleged statement to counsel for the petitioners that the unfair practice charges were to be dismissed. The Board concluded that testimony on these subjects by the field examiner fell within the evidentiary privilege protecting informal investigatory and trial preparatory processes of regulatory agencies. Accordingly, the Board revoked the subpoenas for the Board agent's testimony (*id.* at 2 n.1, 64).

upon their withdrawal from the multi-employer unit. The court explained (*id.* at 7 n. 6):

> In the formation of multi-employer units, it is an unfair labor practice for an individual employer to voluntarily recognize a union which does not enjoy majority support among that employer's employees. Thus when employers join a multi-employer unit and recognize the union, they are viewed as implicitly declaring that the majority of their employees favor the union. Subsequent withdrawal from the multi-employer unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor the union's representation * * *.

The court noted that the evidence presented in the instant cases did not differ materially from that in *Tahoe Nugget* and *Sahara-Tahoe*, and concluded that there was substantial evidence to support the Board's finding that the petitioners had failed to establish a good-faith doubt as to the Union's continuing majority status (*id.* at 9-10).[2]

The court agreed with the Board that the evidence that petitioners sought to adduce from the Board field examiner (see note 1, page 5, *supra*) was protected by the privilege preserving the confidentiality of investigative files (Pet. App. 12). The court disagreed with the Board, however, concerning the petitioners' efforts to prove actual loss of majority through

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[2] The court noted that in this case, as in *Tahoe Nugget* and *Sahara-Tahoe*, some evidence was presented by the employers of employee discontent, high turnover, low membership, financial difficulty and a vigorous union membership drive. Such evidence, the court concluded, "individually or cumulatively, presents only an equivocal inference of loss of majority support for the union" (Pet. App. 9-10).

Union membership records. The court reasoned that "[u]nion membership, even in a right-to-work state, is some indication of union support, though it may be only marginally relevant" (*id.* at 12-13; citations omitted). Nonetheless, the court concluded that the Board's ruling sustaining objections to the questioning of the Union business agent was not prejudicial. The court explained (Pet. App. 13; footnote omitted):

> The question asked by the respondents was whether the Union could produce any records that would demonstrate that it had the majority support of the employees * * *.
>
> If the Union had answered the question affirmatively, the Union's position would have been bolstered. If the question had been answered in the negative, that would have presented only slight evidence that the Union in fact did not have the majority support of the employees. Even with the addition of this evidence, the presumption would not have been rebutted. Therefore, we find no error that would require a reversal.

ARGUMENT

1. This case presents essentially the same issues and factual circumstances as were presented in *Tahoe Nugget* and *Sahara-Tahoe, supra.* Certiorari was denied in those cases and petitioners have presented no new arguments which dictate a different result here. Petitioners do not dispute the settled proposition that majority support is presumed to continue following certification or voluntary recognition and that, absent unusual circumstances, the presumption is irrebutable for one year, and thereafter may be rebutted only if the employer shows that the union was actually in the minority or that the employer had a good-faith

reasonable doubt of the union's continued majority support at the time of the refusal to bargain (Pet. App. 5-6). Rather, petitioners essentially contend that the decision of the court of appeals that the presumption was not rebutted here conflicts with numerous other decisions. There is no merit to that contention.[3]

1. Relying on *NLRB* v. *Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir. 1965), petitioners claim (Pet. 8-9) that the presumption of continuing majority status in the individual units has been improperly derived from the Union's status as representative for the multi-employer unit. However, the presumption in this case is not based on the fact that the Union had majority support in the multi-employer unit, but rather on the fact that each petitioner had voluntarily recognized the Union as representative of its employees at the time it joined the multi-employer group (Pet. App. 7 n.6; Pet. Supp. App. 42, 93). In contrast, in *Richard Kaase*, the union's position as majority representative originated with an election in

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[3] Petitioners assert (Pet. 12-13) that the court of appeals acknowledged that its decision conflicts with those of other circuits. However, the court below merely stated (Pet. App. 14-15 n.9) that, of the numerous cases cited to it by petitioners, three "present factual situations in which other circuits may have found the presumption of majority support rebutted upon similar or weaker evidence than presented in these cases." Those three cases are distinguishable from the present case. In *Ingress-Plastene, Inc.* v. *NLRB*, 430 F.2d 542, 547 (7th Cir. 1970), and *Star Mfg. Co.* v. *NLRB*, 536 F.2d 1192 (7th Cir. 1976) (and see 220 N.L.R.B. 582, 583 (1975) (dissenting opinion of then Chairman Murphy)), unlike here, the union had been derelict in its representational duties. The third case, *W & W Steel Co.* v. *NLRB*, 599 F.2d 934 (10th Cir. 1979), is discussed at page 9, *infra*.

the multi-employer unit.[4] No evidence showed that the Kaase employees ever independently desired union representation. Accordingly, the fact of majority status in the single employer unit had never been established in *Richard Kaase*, as it was here by the petitioners' voluntary recognition of the Union. See *Tahoe Nugget, Inc.* v. *NLRB*, *supra*, 584 F.2d at 303 n. 36.

Petitioners' reliance on *W & W Steel Co.* v. *NLRB*, 599 F.2d 934 (10th Cir. 1979), is also unwarranted. In that case, the union's status as majority representative at the Lubbock, Texas plant was based upon an election in a seven plant unit. Ballots from all plants were commingled and it was not known how the Lubbock plant employees had voted. Nor was other evidence adduced to show that the Lubbock plant employees ever independently desired union representation. Thus the union's majority at the single plant had never been established as it was here. The Tenth Circuit, in denying enforcement of the Board's bargaining order in that case, also relied upon the fact that W & W Steel Co. was a successor of the company that operated the Lubbock plant at the time of the original Board election and, further, that W & W Steel Co. took control with no knowledge of the union's presence at the plant. 599 F.2d at 938.

Contrary to petitioners' contention (Pet. 9-10, 13-18), both the Board (Pet. Supp. App. 13, 57, 95, 101) and the court of appeals (Pet. App. 9-10) expressly considered the cumulative effect of the evidence advanced by petitioners concerning the ex-

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[4] In a multi-employer election, the union must receive a majority of the votes of the participating unit employees, but does not have to secure a majority from the employees of any individual employer.

istence of a good-faith doubt of the Union's majority status. The court below correctly concluded that substantial evidence supports the Board's findings that petitioners did not have a good-faith doubt of the Union's majority support, and further review of that fact-bound issue is not warranted. *Universal Camera Corp* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[6]

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[6] Petitioners err in stating (Pet. 7) that the facts in *NLRB* v. *Alvin J. Bart & Co.*, 598 F.2d 1267 (2d Cir. 1979) were "substantially" weaker than those here. In Bart, "three-fourths of the unit members signed [an] anti-union petition" (*id.* at 1272), a fact to which petitioner does not allude. Similarly, petitioners erroneously rely (Pet. 10-12) on *NLRB* v. *Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir. 1973), for the proposition that, despite the six-month time limitation in Section 10(b) of the Act, 29 U.S.C. 160(b), it was entitled to rebut the presumption of continuing majority status by showing that the Union did not enjoy majority status when it was voluntarily recognized by petitioners. In *Dayton Motels*, the employer had sought to prove, in defense to a refusal to bargain charge, that the authorizations obtained to secure union recognition more than six months before the charge was filed were obtained by a supervisory employee who had collaborated with the union and that this fact had been fraudulently concealed from the employer. The Sixth Circuit observed that it was permissible "for the Company to show that it discovered, more than one year after the collective bargaining agreement was signed, the complicity of its supervisor and the concealment by the Union of its misconduct." *Id.* at 334. Here, however, as in *Tahoe Nugget, Inc.*, petitioners seek to introduce evidence of the Union's lack of majority support at the time of the Union's initial recognition for the very purpose of attacking the validity of the presumption of continuing majority status. Moreover, there is no evidence in this case of any fraudulent concealment of misconduct that would lift the six-month restriction of Section 10(b). See *International Ladies' Garment Workers Union* v. *NLRB*, 463 F.2d 907, 922 (D.C. Cir. 1972).

2. Petitioners further assert (Pet. 21-25) that they were barred from introducing evidence that would have demonstrated that the Union was actually lacking in majority support. The question that was asked by the petitioners was whether the Union could produce any records that would demonstrate that the Union had the majority support of the employees. The court of appeals concluded (Pet. App. 13) that, even if the Union had answered the question in the negative, "that would have presented only slight evidence that the Union in fact did not have the majority support of the employees. Even with the addition of this evidence, the presumption [of majority support] would not have been rebutted." Thus, the only question presented is whether, on the instant facts, the court below correctly concluded that petitioners were not prejudiced by the evidentiary ruling. That question turns on the particular circumstances presented here and does not warrant this Court's review.[6]

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[6] Contrary to petitioners' contention (Pet. 23-24), the decision of the court of appeals on this issue is not in conflict with *Automated Business Systems* v. *NLRB*, 497 F.2d 262 (6th Cir. 1974). In *Automated Business Systems*, the employer had sought to introduce affirmative evidence regarding the number of employees who had supported a decertification petition and expressed a desire not to be represented by the union. Here, however, the petitioners sought to demonstrate only the *absence* of documentary evidence that a majority of employees were members of the Union.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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